United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors

SUPREME COURT (PULAU PINANG) — CIVIL APPEAL NO 02-72-1993
PEH SWEE CHIN, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
22 JUNE 1994

Civil Procedure *— Want of prosecution — Delay of about nine years on the part of the appellant in bringing the action — Whether inordinate and inexcusable delay — Whether delay would give rise to substantial risk that it was not possible to have fair trial or likely to cause serious prejudice to defendants — Whether defence for appellant to say that delay was due to on-going negotiations*

In 1979, the appellant filed a writ and a statement of claim against the respondents, claiming for moneys owed under banking facilities. In 1981, the appellant filed an application for an O 14 judgment, but the court refused to grant leave to enter summary judgment. In 1986, the appellant's solicitors took out a summons for directions and the senior assistant registrar ordered the parties, inter alia, to serve on each other a list of documents and file an affidavit verifying such list within 60 days. The appellant's solicitors accordingly filed such an affidavit, which was served on the respondents on the same date. As there was no response at all from the respondents, the appellant's solicitors filed the request for setting down the action for trial in 1988.

In 1989, the respondents filed a summons-in-chambers to apply for a dismissal of the appellant's claim for want of prosecution. The senior assistant registrar granted the application and accordingly struck out the suit. On appeal by the appellants, the respondents contended that nine years had passed since the filing of the writ and during that period, important key witnesses had died and the control of the appellant bank had changed hands a few times and this would substantially prejudice them if the action were to go to trial.

The appellants, however, contended that there had been reasonable and credible excuse for the delay as there were several negotiations between the parties which continued even after the action had been set down for trial. The judge upheld the decision of the senior assistant registrar. The appellants have appealed.

Held, allowing the appeal:

(1) An action may be dismissed for want of prosecution when a party has been guilty of intentional and contumelious default and where there has been inordinate and inexcusable delay in the prosecution of the action. On the question of inordinate and inexcusable delay, the power should be exercised only where the court is satisfied that there has been inordinate and inexcusable delay on the part of the plaintiff and that such delay would give

rise to a substantial risk that it was not possible to have a fair trial or is likely to cause serious prejudice to the defendants. Here, the trial judge had misapplied the above principles as, since the affidavit was filed by the appellants, there had been no further evidence to show which key witnesses of the respondents had since died.

(2) Although, admittedly, the negotiations between the parties were on a 'without prejudice' basis, it was a factor to be considered in favour of the appellant. Moreover, the negotiations were, to some extent, being encouraged by the respondents in the belief that an out of court settlement would be reached.

(3) The judge also overlooked the fact that the respondents themselves had yet to file their list of documents within the stipulated period under the order of the senior assistant registrar in the summons for directions. This was certainly a factor to be taken into account as to whether the respondents had contributed to the delay.

(4) Looking at the pleadings, the entire case of the appellant would depend on documents which are still in existence. Having regard to the above observations and bearing in mind that the prejudice alleged must be shown to be 'serious', on the facts and circumstances of this case, no serious prejudice to the respondents had been made out. The delay in the present case was due to the earnest desire of both parties to reach an amicable settlement which did not succeed.

[Bahasa Malaysia summary

Pada tahun 1979, perayu telah memfailkan suatu writ dan suatu pernyataan tuntutan terhadap responden, menuntut wang yang dihutang di bawah kemudahan perbankan. Pada tahun 1981, perayu telah memfailkan suatu permohonan untuk suatu penghakiman A 14, tetapi mahkamah tidak memberi kebenaran supaya penghakiman terus dimasukkan. Pada tahun 1986, peguamcara perayu telah mengeluarkan suatu saman untuk arahan dan penolong kanan pendaftar telah memerintahkan supaya pihak-pihak itu, antara lain, menyampaikan kepada satu sama lain satu senarai dokumen dan memfailkan suatu afidavit untuk mengesahkan senarai itu dalam tempoh 60 hari. Oleh itu, peguamcara parayu telah memfailkan afidavit sedemikian, yang telah disampaikan atas responden pada tarikh yang sama. Oleh kerana tidak terdapat sebarang jawapan daripada responden, pada tahun 1988, peguamcara perayu telah memfailkan suatu permintaan supaya tindakan itu ditetapkan untuk perbicaraan.

Pada tahun 1989, responden telah memfailkan suatu saman dalam kamar untuk memohon supaya tuntutan perayu diketepikan kerana ketiadaan pendakwaan (want of prosecution). Penolong kanan pendaftar telah membenarkan permohonan itu dan dengan demikian, telah membatalkan tindakan itu. Atas rayuan daripada perayu,

A responden telah berhujah bahawa sembilan tahun telah berlalu semenjak writ itu difailkan dan dalam tempoh itu, saksi mereka yang sangat penting telah meninggal dunia dan kuasa pengurusan perayu bank itu telah diambil alih beberapa kali dan jika tindakan ini dibicarakan, responden akan dimudaratkan secara substantial.

B Akan tetapi, perayu telah berhujah bahawa terdapat alasan yang munasabah dan boleh percaya mengapa kelengahan berlaku, iaitu terdapat perundingan di antara kedua-dua pihak yang berlanjut sehingga selepas tindakan itu ditetapkan untuk perbicaraan. Hakim telah mengesahkan keputusan penolong kanan pendaftar. Perayu telah membuat rayuan.

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Diputuskan, membenarkan rayuan itu:

(1) Suatu tindakan boleh diketepikan kerana ketiadaan pendakwaan apabila suatu pihak bersalah kerana keingkaran yang disengajakan dan patut dihina dan di mana terdapat kelengahan yang terlampau
D atau yang tidak dapat dimaafkan apabila membawa tindakan itu. Mengenai soalan kelengahan yang terlampau atau yang tidak dapat dimaafkan, kuasa itu sepatutnya digunakan hanya di mana mahkamah berpuas hati bahawa telah terdapat kelengahan yang terlampau atau yang tidak dapat dimaafkan oleh pihak plaintif dan bahawa kelengahan sedemikian akan mengakibatkan risiko
E yang substansial bahawa perbicaraan yang adil tidak mungkin diadakan atau besar kemungkinan defendan akan dimudaratkan secara substantial. Di dalam kes ini, hakim perbicaraan telah salah menggunakan prinsip di atas kerana, semenjak afidavit itu difailkan oleh perayu, tidak terdapat bukti selanjutnya yang
F menunjukkan bahawa saksi responden yang sangat penting telah meninggal dunia.

(2) Walaupun rundingan di antara kedua-dua pihak adalah atas dasar 'tanpa menjejas' ('without prejudice'), ia merupakan suatu perkara yang perlu dipertimbangkan memihak kepada perayu.
G Lebih-lebih lagi, rundingan itu, sehingga takat tertentu, telah digalakkan oleh responden kerana mereka percaya bahawa suatu penyelesaian di luar mahkamah akan dicapai.

(3) Hakikat bahawa responden sendiri masih belum memfailkan senarai dokumen mereka di dalam tempoh masa yang ditetapkan
H di bawah perintah penolong kanan pendaftar di dalam saman untuk arahan telah terlepas perhatian hakim itu. Ini sememangnya merupakan suatu faktor yang perlu diambil kira untuk menentukan sama ada responden telah menyumbang kepada kelengahan itu.

(4) Memandangkan pliding itu, keseluruhan kes perayu akan
I bergantung kepada dokumen yang masih wujud. Dengan mempertimbangkan pemerhatian di atas dan mengingatkan bahawa kemudaratan yang dikatakan itu mestilah 'serius', di atas fakta dan keadaan kes ini, kemudaratan serius kepada responden

tidak dapat ditunjukkan. Kelengahan di dalam kes ini adalah disebabkan oleh kehendak yang bersungguh-sungguh pada kedua-dua pihak untuk mencapai suatu penyelesaian secara persahabatan yang tidak berjaya.]

Notes

For cases on want of prosecution, see 2 *Mallal's Digest* (4th Ed) paras 2382–2383.

Cases referred to

Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229; [1968] 1 All ER 543 (refd)
Austin Securities Ltd v Northgate & English Stores Ltd [1969] 2 All ER 753; [1969] 1 WLR 529 (refd)
Birkett v James [1978] AC 297; [1977] 2 All ER 801 (refd)
National Insurance & Guarantee Corp Ltd v Robert Bradford & Co Ltd (1970) 114 SJ 436 (refd)
Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)
Sel-Rex Corp v PMD Chemicals Ltd [1971] RPC 297 (refd)
Vasudevan v Damodaran & Anor [1981] 2 MLJ 150 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 25 r 1(5), O 34 r 8(1)
Rules of the Supreme Court 1980

Appeal from: Civil Suit No C720–1979 (High Court, Kuala Lumpur)

DP Naban (*Aznam Mansor* with him) (*Lee Hishammuddin*) for the appellant.
KS Narayanan (*Narayanan Associates*) for the respondents.

Cur Adv Vult

Mohamed Dzaiddin SCJ (delivering the judgment of the court): This is an appeal by the appellant, United Malayan Banking Corp Bhd, from the judgment of the Kuala Lumpur High Court given on 5 August 1992, upholding the decision of the senior assistant registrar in allowing the dismissal of the appellant's action for want of prosecution.

The following account of the facts of the case is taken largely from the learned judge's grounds of judgment (at p 13 of the appeal record). On 12 November 1979, the appellant, who was the plaintiff in the court below, filed a specially indorsed writ and a statement of claim against the first respondent and three others, claiming for moneys owed under banking facilities granted to the first respondent and guaranteed by the second, third and fourth respondents. On 22 November 1979, the respondents entered appearance and filed their defence and counterclaim. On

A 12 January 1980, the plaintiff filed the reply and defence to counterclaim. On 31 March 1980, the respondents filed an amended defence and counterclaim. Later, the respondents filed a re-amended defence and counterclaim, followed by the filing of an amended reply and defence to the said counterclaim.

B Subsequently, on 16 June 1981, the plaintiff filed an application for an O 14 judgment. On 9 January 1982, the judge refused to grant leave to enter summary judgment and on appeal to the then Federal Court, the said appeal was dismissed with a direction that an early date be granted for the trial of the action. [See [1983] 1 MLJ 206.]

C On 4 April 1986, the plaintiff's solicitors took out a summons for directions and on 25 July 1986, the senior assistant registrar ordered the parties to serve on each other a list of documents and file an affidavit verifying such list within 60 days; that there be inspection of documents within 14 days of service of the list and the filing of the affidavits; and that the estimated length of time for the trial be four days and that there be 14 D witnesses and that the trial be set down for hearing within 120 days. The plaintiff's solicitors, accordingly, filed an affidavit verifying the list of documents on 6 October 1987 and served on the respondents on the same date. Then, on 8 December 1987, the said solicitors sent a reminder to the respondents' solicitors giving them notice to file their affidavit within two weeks.

E As there was no response at all, on 3 July 1988, the plaintiff's solicitors filed the request for setting down the action for trial. Nothing happened until after more or less waking up from their slumber, the respondents suddenly realized that it was time to apply for a dismissal of the plaintiff's claim for want of prosecution. On 3 April 1989, the F respondents filed their summons-in-chambers which was heard by the senior assistant registrar who, on 20 April 1989, granted the application and accordingly struck out the suit.

On appeal to the judge-in-chambers, the respondents contended that there was a lapse of more than three years from the date of the judgment G of the Federal Court until the plaintiff took out the summons for directions.

The respondents also contended that the plaintiff had not properly set down the action for trial for about 2½ years after the expiry of the period allowed by the court under the order on summons for directions. All in all, nine years had passed since the filing of the writ and during this H period, important key witnesses had died and the control of the plaintiff bank had changed hands a few times. According to the respondents, this will substantially prejudice them if the action were to go to trial. Finally, the respondents contended that the plaintiff's solicitors had not complied with the order of summons for directions when they filed the affidavit verifying the list of documents.

I The plaintiff, in its affidavit, averred that between late 1982 and April 1986, negotiations had taken place between the parties. After a lapse of about three months, a second series of negotiations took place. According to the plaintiff, their negotiations went on until 13 June 1988. When

negotiations failed, the plaintiff took steps to proceed with the action by filing the affidavit verifying the list of documents on 6 October 1987. A

The plaintiff contended that there had been no inordinate and inexcusable delay on its part in prosecuting the action nor had the respondents been prejudiced at all.

After hearing the submissions of counsel, the learned judge came to a finding that there had been inordinate and inexcusable delay on the part of the plaintiff in prosecuting the action since the Federal Court delivered its judgment on 13 October 1982. His Lordship gave the following reasons (at p 18 of the appeal record): B

> It was not in dispute that there were negotiations between the parties since then. The negotiations were without prejudice negotiations. The plaintiff could not use the negotiations to justify it to violate the order on summons for directions. The order on summons for directions dated 25 July 1986 required the plaintiff to file an affidavit verifying the list of documents within 60 days from the date of court order. The plaintiff filed the affidavit verifying the list of documents on 6 October 1987, that is more than a year from the date of the order without asking the court for extension of time. C D
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> The plaintiff, in its affidavit (encl 35) alleged that 'it was implicitly agreed (with the knowledge and encouragement of the defendants) that no steps be taken in the proceedings ...' If there were such an agreement between the parties, whether implicit or explicit, the plaintiff should have no difficulty in getting a consent order from the senior assistant registrar for extension of time to file the affidavit verifying the list of documents. But the plaintiff contravened the said order and proceeded on to set the matter down for trial. E
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> Mr Narayanan, counsel of the defendants submitted that there was no understanding between the parties not to proceed with the action as alleged by the plaintiff. He added that even though there were negotiations, time did not stop. I agreed with Mr Narayanan's submission that the defendants did not acquiesce in the delay. Indeed the defendants' solicitors in a letter dated 23 December 1987 which was addressed to the plaintiff's solicitors, had protested over the delay and the conduct of the plaintiff in filing the affidavit verifying the list of documents in contravention of the order on summons for directions. F G
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> With regard to the question of prejudice, Mr Narayanan submitted that the defendants were prejudiced. He said that the defendants had a counterclaim. I had earlier referred to the defendants' affidavit where it was averred that the important witnesses had died and that the control of the plaintiff bank had changed hands a few times. Mr LH Ng said that it was the plaintiff that was prejudiced. In my view the defendants were likely to be seriously prejudiced by the delay. H
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> I was satisfied that in the circumstances of the present case the defendants' application for an order that the plaintiff's claim be dismissed for want of prosecution was justified. The defendants' case was consistent with the principles laid down by Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at p 268D–G. I

Before us, Encik Naban raised the same points which were submitted in the court below. Counsel submitted that based on affidavit evidence, the

A appellant had shown that there was reasonable and credible excuse for the delay. Between 25 July 1986 and 13 June 1988, there were several negotiations which continued even after the action was set down for trial. These negotiations were held with a view to an amicable settlement where both parties had actively participated. Again, from the correspondence, the appellant had been encouraged by the respondents to believe that a settlement would be negotiated successfully. On the question of prejudice, counsel submitted that the appellant's claim was based on well-documented commercial lending transactions in which oral evidence would not play a prominent part. While conceding that the appellant's management had changed hands since the commencement of the action, counsel was confident that the documents relating to the loan remained intact and would be made available during the trial. Furthermore, there were no particulars or further evidence to substantiate the respondents' averment that their key witnesses had died.

It was further argued, although by way of alternative argument, that even if the delay was inordinate and inexcusable, the respondents themselves have contributed to the said delay and were themselves guilty by not filing their list of documents within the stipulated time despite reminders from the appellant's solicitors. In this regard, Encik Naban informed us that to date, despite reminders from the appellant's solicitors, the respondents have not filed their list of documents, nor have they protested with regard to the delay in setting down the action for trial.

Encik Narayanan, for the respondents, urged us not to disturb the decision of the learned judge because his Lordship had exercised his discretion correctly, which the appellate court should be loath to interfere with. Counsel submitted that the learned judge had dealt with the issues raised and had come to a conclusion that there was inordinate and inexcusable delay on the part of the appellant in prosecuting the action which would prejudice the respondents.

From the record, it is clear to us that the application to dismiss the appellant's action for want of prosecution was not made under the specific provisions of O 25 r 1(5) (default in discovery) or O 34 r 8(1) (default in setting down action for trial) of the Rules of the High Court 1980 but was applied under the court's inherent jurisdiction. According to 1 *Supreme Court Practice 1993*, para 25/1/4 at p 470, in addition to the express provisions given in the Rules of the Supreme Court 1980, the court has inherent jurisdiction to dismiss an action for want of prosecution if there had been default in complying with the rules or excessive delay in the prosecution of the action. Generally speaking, the same principles are applied whether the court is acting under its express power or under its inherent jurisdiction. According to Lord Diplock in *Birkett v James* [1978] AC 297 at p 318; [1977] 2 All ER 801 at 804:

> ... [the] High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for

> hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in *Reggentin v Beecholme Bakeries Ltd* [1968] 2 QB 276 (reported in a note to *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229) and *Fitzpatrick v Batger & Co Ltd* [1967] 1 WLR 706.

From the authorities, it is settled law that there are two distinct, though related, circumstances in which an action may be dismissed for want of prosecution, namely: (a) when a party has been guilty of intentional and contumelious default; and (b) where there has been inordinate and inexcusable delay in the prosecution of the action (*Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543, approved in *Birkett v James* [1978] AC 297; [1977] 2 All ER 801, and followed in *Vasudevan v Damodaran & Anor* [1981] 2 MLJ 150). On the question of inordinate and inexcusable delay, the power should be exercised only where, according to Lord Diplock ([1978] AC 297 at 318; [1977] 2 All ER 801 at 805), the court is satisfied:

> ... (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

On the question of prejudice which must be 'serious', we would rely on the passage in the 1 *Supreme Court Practice 1993* (at p 472):

> This is a matter of fact and degree and has been discussed in *Allen v McAlpine* [1968] 2 QB 229; [1968] 1 All ER 543, CA and in a large number of reported cases. The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are the most usual factors. Their importance depends upon the circumstances, the issues and the other evidence that can be given. Thus the lapse of time may be very prejudicial if the circumstances of an accident or oral contracts or representations are in issue, but is of much less importance in a heavy, well-documented commercial action (*National Insurance Guarantee Corp Ltd v Robert Bradford & Co Ltd* (1970) 114 SJ 436, CA). But prejudice is not limited to matters affecting proof; a defendant, particularly a professional man, may be made prejudiced by having an action hanging over his head indefinitely (*Biss v Lambeth, Southwark and Lewisham Health Authority (Teaching)* [1978] 1 WLR 382; [1978] 2 All ER 125, CA).

Considering the grounds of judgment, it would appear to us that his Lordship has misapplied the above principles, particularly on the question of 'serious' prejudice, to the given facts of the case. His Lordship relied on para 5(1) of the third respondent's affidavit alleging that nine years had passed by since the filing of the writ and, aside from important and key witnesses having died, the control of the plaintiff bank itself has changed hands a few times. It appears to us that since this affidavit was filed, there has been no further evidence to show who the key witnesses of the

respondents who have since died. As pointed out by Encik Naban, both Dato' KK Sharma, who incidentally is the third respondent and the alter ego of the respondent company, and Dato' Mohd Salleh Yusoff are still around. Next, his Lordship seemed to have rejected the contention that the delay was caused by the negotiations between the parties. Although, admittedly, they were on a 'without prejudice' basis, nevertheless it was a factor to be considered in favour of the appellant. Moreover, the negotiations were, to some extent, being encouraged by the respondents which, in the words of Encik Naban, the appellant was 'in the belief that an out-of-court settlement would be reached' (*Sel-Rex Corp v PMD Chemicals Ltd* [1971] RPC 297 at p 300). Thirdly, the learned judge overlooked the fact that the respondents themselves have yet to file their list of documents within the stipulated period under the order of the senior assistant registrar in the summons for directions. This is certainly a factor to be taken into account as to whether the respondents have contributed to the delay. (*Austin Securities Ltd v Northgate & English Stores Ltd* [1969] 2 All ER 753; [1969] 1 WLR 529, CA). Fourthly, looking at the pleadings, we tend to agree with counsel that the entire case of the appellant would depend on the documents, such as, loan agreements, letters of guarantee, title deeds and sale and purchase agreements. According to counsel, they are still in existence (*National Insurance & Guarantee Corp Ltd v Robert Bradford & Co Ltd* (1970) 114 SJ 436, CA). Having regard to the above observations and bearing in mind that the prejudice alleged must be shown to be 'serious', we are satisfied that, on the facts and circumstances of this case, no serious prejudice to the respondents has been made out. On a whole, we are of the view that the delay in the present case was due to the earnest desire of both parties to reach an amicable settlement which did not succeed.

The Privy Council, in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228, held that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion has been exercised on a wrong principle. However, arising from what we have stated above, we feel justified in interfering with the learned judge's decision. In the result, we allow this appeal with costs here and below. The order of the High Court is set aside and the suit shall now be set down for an early trial. As the parties have, at the outset of the present appeal, agreed that the decision here would bind Civil Appeal Nos 02–81–93 and 02–90–93, we accordingly order that both the cases be similarly set down for trial. Refund of the deposit to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim